86-245

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HUMBOLDT BAY MUNICIPAL WATER DISTRICT,
Petitioner,

VS.

LOUISIANA-PACIFIC CORP.; SIMPSON TIMBER CO;
SIMPSON PAPER CO.; CROWN ZELLERBACH CORP.;
AND HUMBOLDT BAY PULP CO.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Was it *per se* lawful under the Sherman Act for two purchasers of 80% of a local water district's total output to collusively refuse to adjust the rates which were previously established in their 40-year water supply contracts but which, as a result of a mistake, were substantially below the water district's costs and therefore subject to reformation under California law?

2. Was it *per se* lawful under the Sherman Act for two purchasers of 80% of a local water district's total output to collusively refuse the water district's pleas for reformation of their water rates because the District Court believed that (a) the water district's pleas for reformation had "precipitated" defendants' collusive refusal to grant it and that (b) defendants therefore must not have "intended" to restrain competition?

THE PARTIES

Petitioner is Humboldt Bay Municipal Water District. Respondents are Louisiana-Pacific Corp., Simpson Timber Co., Simpson Paper Co., Crown Zellerbach and Humboldt Bay Pulp Co.

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner, Humboldt Bay Municipal Water District (herein the "Water District"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on March 28, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals is not reported; a copy is printed in the Appendix hereto. The opinion of the District Court for the Northern District of California is also printed in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 28, 1986. An extension of time in which to file this petition for certiorari was granted on June 18, 1986,

extending same to August 15, 1986. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, relevant excerpts of which are set forth in the Appendix.

STATEMENT OF THE CASE

During the past 20 years, the Water District has been trying to obtain compensatory rates for water sold to respondents. During those same years, respondents have conspired to depress and maintain those rates below the Water District's costs—in derogation of the Water District's contractual rights and statutory obligations. This action was brought under §§ 1 and 2 of the Sherman Act to obtain relief from respondents' continuing antitrust violations so as to avert bankruptcy and so that the Water District will no longer have to subsidize respondents' violations with annual property tax levies upon the 60,000 inhabitants within its jurisdiction.

A. The Facts

The Water District is a local public agency. As such, it is charged by California law with the obligations of a public trustee to collect and distribute the public's water in accordance with the general welfare and to charge rates for water that are sufficient to cover all of the Water District's costs. *Ivanhoe Irrigation Dist. v. All Parties*, 47 Cal.2d 597, 625 (1957); *Nat'l Audubon Society v. Superior Court*, 33 Cal.3d 419, 437-38, 447 (1983); Cal. Const. Article X, § 2; California Water Code § 71616.

Respondents own several lumber and pulp mill operations located throughout the Northwest (ER 581-82). They purchase approximately 60 million gallons of water per day from the Water District for use in the manufacture of pulp at their plants in Eureka, California (ER 267-357). Respondents purchase that water—collectively representing 80% of the Eureka community's water supply—pursuant to identical long-term contracts with the

Water District (ER 267-357; 369, par. 6; 364, par. 5; 401, par. 5; 410, par. 3; 423).

In 1959, shortly after the Water District was formed and its reservoir and dam were built, respondents sought identical 40-year water supply contracts from the Water District. Although reluctant to grant contracts of such long duration, the Water District acceded to respondents' request subject to one important condition: the rates for water to be supplied to respondents over the life of those contracts had to be sufficient to cover the Water District's costs of supplying that water. This was critical to the Water District and was mandated by California law (Water Code § 71616). The Water District therefore made it clear to respondents that if they were to be given most of the public's available water supply for private use until the year 2000, it must not be at taxpayer expense (ER 359, par. 3; 364, par. 5; 417, par. 4; 445, par. 5; 583-88; 596-98; 764; 777-79; 801-02; 808; 830-34). Respondents agreed (ER 278; 658A-C; 769; 879). Contracts were therefore signed, obligating the Water District to deliver 80% of its total output to respondents until the year 2000 at cost-based rates (ER 267).

But soon thereafter, the Water District discovered serious errors in the rate formulas contained in respondents' contracts which prevented the Water District from obtaining revenues sufficient to cover its costs over the life of those contracts.[1] As every year passed, the Water District's costs soared further while the rates paid by respondents under their defective formula lagged

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[1] Briefly they were as follows: First, the parties had assumed the Water District's operating and maintenance costs would be only 15% of the Water District's total costs and therefore allowed only 15% of the Water District's base rates to be adjusted upward with cost increases. This proved grossly inaccurate. Those costs *started at 45%* of total costs in 1963 and *climbed to 84%* in 1984 (ER 367, par. 9; 574-76). Second, the parties assumed the Wholesale Price Index ("WPI") would be an accurate index of the Water District's cost increases and therefore included that index in the contracts. But electric power—the Water District's largest cost—was not reflected in the WPI. Consequently, the Water District's total costs increased *by 792%* from 1963 to 1984 or *four times* the WPI's increase over those same years (ER 577).

behind—resulting in a severe cost/price squeeze that now threatens the Water District with imminent bankruptcy. Price Waterhouse reported that unless those errors were corrected, the Water District will sustain losses totaling $25 million (ER 534-35).

As soon as it discovered the rate errors in respondents' contracts, the Water District reported them to respondents and repeatedly thereafter attempted to get respondents to adjust their rates so as to allow the Water District to recoup its costs in accordance with the parties' original intent (ER 601-02; 865; 890). Despite their clear obligation to pay compensatory rates for water, respondents have concertedly refused the Water District's pleas ever since (ER 402-03; 411; 414; 427, § C; 946-52; 1002; 1029; 1032-35; 1039-49; 1132; 1157-59).

There is substantial evidence of respondents' collusion (*see, e.g.*, ER 360, par. 5; 402, par. 6 *et seq.*; 412, par. 7 *et seq.*; 427, § C; 617; 624; 634; 670-72; 676-80; 701-02; 732-33; 744-47; 752; 763; 821; 868-82; 892-97; 910; 940-43; 946-52; 1001; 1007; 1020-29; 1032-35; 1039-49; 1106-27; 1149; 1151-62; 1176; 1212-13; 1216); there is no evidence to rebut it; and the courts below correctly assumed it. The record shows that—in practically every year from the early 1960s to the present—the Water District pled with respondents to consent to a correction of their rates as contemplated by their contracts and that—in practically every year from the early 1960s to the present—respondents conspired to refuse the Water District's pleas (*id.*). Respondents would frequently caucus—without the Water District's knowledge or consent—to agree upon the "joint position" and "combined action" they would take against the Water District regarding water rates (ER 411-12; 607-11; 632-34; 650; 671-79; 731-32; 1176).

They knew the Water District's plight was due to a serious error in their contracts but they concertedly refused any correction in their rates that would rescue the Water District from that plight. Faced with a mounting fiscal crisis in 1976, the Water District informed respondents that unless they relented from their joint stance the Water District would be forced to commence annual property tax levies upon the local public to subsidize its

water sales to respondents (ER 1177-79). Respondents again—as on countless prior occasions—privately caucused, then agreed with each other to (in their words) "let nature take its course" (ER 1176).

B. The Proceedings Below

Rather than continue taxing the local public to pay for respondents' water until the year 2000, the Water District commenced this action in November 1983 on behalf of all taxpayers within its jurisdiction to obtain relief from respondents' collusive refusal to reform their contract rates in violation of the antitrust laws.[2] The Water District alleged that respondents violated §§ 1 and 2 of the Sherman Act by conspiring to restrain trade and monopsonize the relevant market for water in Humboldt County (ER 1-12; 35). The Water District further alleged that, as a result of respondents' antitrust violations, their 40-year water supply contracts have become and will remain economically impracticable for the Water District to perform and therefore are subject to equitable reformation under *Restatement of Contracts (Second)* §§ 155, 261 and 266; *Aluminum Co. of America v. Essex Group, Inc.*, 499 F.Supp. 53 (W.D. Pa. 1980) and *City of Vernon v. City of Los Angeles*, 45 Cal.2d 710 (1955) (ER 35-38).

Despite ample proof of respondents' collusive behavior—respondents have never denied it but instead assert they were entitled to collude and that besides the Water District "made them do it"—the District Court on May 10, 1985 (a) granted respondents' motion for summary judgment and (b) denied the Water District's motion for partial summary judgment under *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) and

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[2] Before commencing this action, the Water District had enacted an ordinance to establish compensatory rates effective July 1, 1978. To retain the benefits of their unlawfully depressed rates, respondents commenced joint litigation against the Water District in state court. Five years later—in November 1982—the state court declared the Water District did not have the power to modify contract rates by legislative action. *Louisiana-Pacific Corp. v. Humboldt Bay Municipal Water District*, 137 Cal.App.3d 152 (1982). This action followed.

Arizona v. Maricopa County Medical Soc., 457 U.S. 332 (1982) (App. B, p. A-13).

The District Court opined that summary judgments are "particularly" desirable in antitrust cases (for defendants anyway) because of "the enormous expenditure of time and other resources commonly necessary in antitrust cases" and because of "the complexity of the issues and the general inexperience of jurors in this area" (App. B, p. A-6). Then, incorporating key passages from respondents' summary judgment brief, the District Court held the Water District was not entitled to relief under § 1 or § 2 of the Sherman Act (App. B, pp. A-3, A-9, A-10).[3] The District Court did not deny that respondents had conspired but, on the contrary, expressly acknowledged their "joint action" (App. B, p. A-9). Instead, it held that respondents' collusive behavior was not actionable for two reasons:

First: Once the parties executed their long-term water supply contracts, respondents were forever after legally free to collusively refuse the Water District's equitable right to reformation of those contracts ("such refusal would merely obligate the District to abide by the rates set by the contracts") (App. B, p. A-9).

Second: Because the Water District repeatedly sought reformation of the water rates in "joint letters" to respondents and "joint meetings" with respondents, respondents' collusive action was "precipitated" by the Water District and therefore must not have been "intended" by respondents ("it was thus the District's activity which precipitated joint action on the part of defendants and not an intent on the part of defendants to harm or unreasonably restrain competition") (App. B, p. A-9).

The Court of Appeals affirmed, declaring without analysis that "defendants' [admittedly concerted] refusal to renegotiate the price of water established by their forty-year contracts with plaintiff does not give rise to a violation of either section 1 or section 2 of the Sherman Act" (App. A, p. A-1).

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[3] While finding the Water District's reformation claim of "some merit," the District Court dismissed it also for lack of pendent jurisdiction (App. B, pp. A-12, A-13).

REASONS FOR GRANTING THE WRIT

Just last Term, this Court granted certiorari in *Matsushita Elect. Indus. Co. v. Zenith Radio,* ____ U.S. ____, 106 S.Ct. 1348 (1986) so as to ensure that summary judgments for defendants are granted in antitrust cases when there is no plausible circumstantial evidence of collusive behavior. For equally important reasons, this Court should grant certiorari here so as to ensure that summary judgments are *denied* when there is *ample direct proof* of collusive behavior which defendants fail to refute and the courts below acknowledge. Surely injured plaintiffs—who are encouraged by Congress to help vindicate antitrust policy through private litigation, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,* ____ U.S. ____, 105 S.Ct. 3346, 3368 (1985)—should be accorded the same protection *from* Rule 56 of the Federal Rules of Civil Procedure as *Matsushita* gives innocent defendants under it. As Justice Stevens (Justices Brennan and Marshall joining) declared in *Mitsubishi:*

> "The Sherman and Clayton Acts reflect Congress' appraisal of the value of economic freedom; they guarantee the vitality of the entrepreneurial spirit. *Questions arising under these Acts are among the most important in public law."* 105 S.Ct. at 3367 (emphasis added).

In granting summary judgment on this record, the courts below shunted aside roughly a dozen important Supreme Court authorities. They are discussed below. But to correct flagrant error with respect to important legal questions is not the only reason for this petition. There is just as much at stake as there is at issue. Because of the lower court's actions, the Water District is being forced to subsidize defendants' collusive refusal to pay compensatory rates with annual property tax levies upon its local citizenry and will be forced to continue doing so into the twenty-first century.

I. The Lower Court's Refusal to Apply the *Per Se* Rule to Respondents' Horizontal Restraints is in Direct Conflict with this Court's Decisions in *Catalano, Maricopa* and *Sugar Institute*

On two occasions within the past six years, this Court had to issue a writ of certiorari to the Ninth Circuit for the purpose of reiterating its rule that horizontal price collusion is a *per se* violation of the Sherman Act. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980); *Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332 (1982). The Water District cited those authorities to the courts below in support of its motion for partial summary judgment and in opposition to respondents' motion for summary judgment. The lower courts' decisions flout both of those authorities without even bothering to acknowledge either of them by name.

The rule which the courts below ignored is clear: "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). Respondents' collusive refusal to correct their rates so as to cover the Water District's costs—in disregard of the Water District's equitable right to reformation—obviously served to "depress" and "stabilize" them below those costs. *See United States v. Container Corp. of America*, 393 U.S. 333, 336, 340 (1969); *Sugar Institute v. United States*, 297 U.S. 553, 601-02 (1936); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. at 647, 650; *Nat. Soc. of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978).

Respondents contended and the lower courts held that while respondents may not conspire to fix a price in the first place, they may conspire to adhere to that price thereafter with impunity. The District Court thus declared that "even if defendants had [concertedly] refused to renegotiate the water contracts . . . such refusal would merely obligate the District to abide by the rates set by the contracts" (App. B, p. A-9). The Court of Appeals similarly held that "defendants' [concerted] refusal to renegotiate the price of water established by their forty-year contracts with

[the Water District] does not give rise to a violation of either section 1 or section 2 of the Sherman Act" (App. A, p. A-1).

If the lower courts are right, *Catalano* is wrong. Defendants there were charged with conspiring to discontinue credit to plaintiffs. Plaintiffs sought to have the *per se* rule applied to defendants' collusion. Both lower courts refused, questioning the effect of defendants' conduct on prices. But this Court granted certiorari and summarily reversed, holding that conspiracies which tamper with price—even indirectly—are *per se* unlawful. In so doing, the Court took occasion to reiterate the rule in *Sugar Institute* that "an agreement to *adhere* to *previously* announced prices and terms of sale, even though . . . *the particular prices and terms were not themselves [unlawfully] fixed*" (*Catalano*, 446 U.S. at 647; emphasis added) is a *per se* violation. That is this case. The lower court decisions are therefore in plain conflict with *Catalano* (as well as *Maricopa* and *Sugar Institute* and *Socony-Vacuum*) with respect to an important rule of law. Nor is the lower courts' error a harmless aberration. Obviously much commerce is conducted pursuant to contracts of long duration, as here. The question can therefore arise whenever two sellers or two buyers collusively refuse to adjust the prices that are reflected in their executory contracts with the other parties thereto.

But certiorari should not be granted solely to resolve this plain conflict on an important question of law. Twice before this Court had to reverse the Ninth Circuit because the Ninth Circuit refused to apply the *per se* rule on similar facts (*Catalano* and *Maricopa*). The Water District stressed those decisions to both lower courts. Both courts disregarded them and, inexplicably, neither even acknowledged them. Certiorari should therefore also be granted—so as to summarily reverse if nothing else—because the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Supreme Court Rule 17.1(a).

II. The Lower Court's Approval of Respondents' Horizontal Restraints under the Rule of Reason is in Direct Conflict with this Court's Decisions in *Professional Engineers, N.C.A.A.* and *Indiana Federation of Dentists*

Even if respondents' concerted actions to depress the Water District's rates below the Water District's costs were not to be adjudged a *per se* violation under *Catalano, Maricopa, Socony-Vacuum* and *Sugar Institute,* they clearly deserve to be scrutinized by a jury under the rule of reason. By holding that respondents' collusion was *per se* lawful, thereby foreclosing rule of reason analysis, the lower courts are in direct conflict with this Court's decisions in *Nat. Soc. of Professional Engineers v. United States*, 435 U.S. 679 (1978); *N.C.A.A. v. Bd. of Regents of Univ. of Okl.*, ____ U.S. ____, 104 S.Ct. 2948 (1984); and *FTC v. Indiana Federation of Dentists*, ____ U.S. ____, 106 S.Ct. 2009 (1986).

"Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition." *N.C.A.A.*, 104 S.Ct. at 2962. Moreover, proof of such effect is substantially easier when the restraint affects price and is horizontally imposed by defendants who collectively enjoy 80% of the market—as here. *Id.* at 2965; *Professional Engineers*, 435 U.S. at 692. Thus in *Professional Engineers* this Court readily condemned a concerted refusal by competitors to negotiate engineering fees—not unlike respondents' concerted refusal to renegotiate water rates. "While this is not price fixing as such," *Professional Engineers* declared, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." 435 U.S. at 692. Similarly in *N.C.A.A.*, this Court disapproved a horizontal restraint under the rule of reason chiefly because—as here—the restraint affected price. "Restrictions on price and output," the Court declared, "are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit." *N.C.A.A.*, 104 S.Ct. at 2964.

Just last Term, shortly after the Ninth Circuit affirmed summary judgment herein, this Court again condemned a horizontal restraint under the rule of reason on similar facts. *FTC v. Indiana Federation of Dentists*, ____ U.S. ____, 106 S.Ct. 2009 (1986).

Defendants there concertedly refused to cooperate with dental insurers by providing them with x-rays for review in determining coverage. The Court had no difficulty in finding that competition was harmed by defendants' restraint. Justice White explained for a unanimous Court:

> "A refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement,"—as here—"impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them." 106 S.Ct. at 2018.

Again, either the courts below were right or this Court in *Professional Engineers, N.C.A.A.* and *Indiana Federation of Dentists* was right—but not both. We believe this Court was right and that it should grant certiorari to eliminate this conflict by reversing the courts below with instructions to heed those authorities.[4] This Court will not be vindicating those precedents *in vacuo*. The record below is rich with evidence—most of it uncontradicted—that respondents' collusion substantially restrained competition (ER 406, par. 13; 360, par. 6, 7; 397, par. 11; 414, par. 8; 431-32, par. D, E; 609-12; 758-59). As a direct result of respondents' collusive repudiation of the Water District's equitable right to reformation of their contracts under *Restatement of Contracts (Second)* §§ 155, 261 and 266, *Aluminum Co. of America v. Essex Group, Inc.*, 499 F.Supp. 53 (W.D. Pa. 1980) and *City of Vernon v. City of Los Angeles*, 45 Cal.2d 710 (1955)—a right which the District Court acknowledged to be of "merit"—the rates which respondents have paid for the water they have taken have never even approached the Water District's costs since their contracts were executed over 20 years ago. As in *Indiana Federation of Dentists*, respondents' collusion has prevented the market

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[4] The courts below did not have the benefit of *Indiana Federation of Dentists*. But that is another reason to grant certiorari, i.e., to accord the courts below the opportunity to apply it to this record. *See Ford Motor Company v. Tunis Brothers Company, Inc.*, ____ U.S. ____, 106 S.Ct. 1509 (1986).

from "ensuring the provision of goods and services to consumers *at a price approximating the marginal cost of providing them.*" 106 S.Ct. at 2018. Consequently, the Water District—to stave off bankruptcy—is being forced to subsidize the delivery of 80% of the public's water supply to respondents with annual property tax levies upon its 60,000 inhabitants until the year 2000. Those public subsidies of respondents' antitrust violations will approximate $25 million. As in *Professional Engineers*, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." 435 U.S. at 692.

III. The Lower Court's Approval of Respondents' Horizontal Restraints is in Direct Conflict with this Court's Decision in *General Motors*

The lower court decisions also do violence to this Court's decision in *United States v. General Motors Corp.*, 384 U.S. 127 (1966). The record below will convince this Court that, as a result of the mistake in respondents' contracts and respondents' concerted refusal to correct that mistake, those contracts have become economically impracticable for the Water District to perform and therefore are subject to reformation under *Restatement of Contracts (Second)* §§ 155, 261 and 266, *Aluminum Co. of America v. Essex Group, Inc.*, 499 F.Supp. 53 (W.D. Pa. 1980) and *City of Vernon v. City of Los Angeles*, 45 Cal.2d 710 (1955). The District Court agreed, finding "the District's reformation claim of some merit" (App. B, p. A-13).

Yet the District Court held that respondents' collusive refusal to pay compensatory rates was *per se* lawful because "such refusal would merely obligate the District to abide by the rates set by the contracts" (App. B, p. A-9). The Court of Appeals similarly held, without analysis, that "defendants' [concerted] refusal to renegotiate the price of water established by their forty-year contracts with plaintiff does not give rise to a violation of either section 1 or section 2 of the Sherman Act" (App. A, p. A-1). This presents a serious question concerning the relationship between federal antitrust law and state contract law. Is there a state "contract enforcement" defense to a federal antitrust violation? May repondents collusively refuse to honor the Water District's equitable right to reformation of their contracts—a right which the District

Court acknowledged—because it would (using the District Court's words) "merely obligate the District to abide by the rates set by the contracts"? Respondents contended they could because "any [collusive] refusals to renegotiate by defendants did no more than *force* plaintiff to live up to its previous commitments" (ER 123)—and, to the Water District's shock, the lower courts agreed.

Here again, the lower courts disregarded this Court's answer to that question in *United States v. General Motors Corp.*, 384 U.S. 127 (1966). In *General Motors*, defendants were charged with violating § 1 of the Sherman Act by jointly inducing General Motors to terminate dealers who dealt with "discounters." Defendants, including General Motors, contended they were merely enforcing the "location clause" contained in their dealership contracts; that said clause was valid and enforceable; and that, consequently, defendants' joint enforcement of their contractual rights could not be a violation of the Sherman Act. The trial court agreed with defendants, granting judgment in their favor after trial. Reversing, the Supreme Court held that defendants' conduct was illegal price fixing and flatly rejected their "joint contract enforcement" defense. It declared:

> "We do not decide whether the 'location clause' may be construed to prohibit a dealer, party to it, from selling through discounters, or whether General Motors could by unilateral action enforce the clause, so construed. We have here a classic conspiracy in restraint of trade. . . . Against this fact of unlawful combination, the 'location clause' is of no avail. Whatever General Motors might or might not lawfully have done to enforce individual Dealer Selling Agreements by action within the borders of those agreements and the relationship which each defines, is beside the point. And, because the action taken constitutes a combination or conspiracy, it is not necessary to consider what might be the legitimate interest of a dealer in securing compliance by others with the 'location clause,' or the lawfulness of action a dealer might individually take to vindicate this interest." 384 U.S. at 139-40.

This presents an important question concerning the relationship between federal antitrust law and state contract law, and no less so merely because the lower courts inexplicably failed to bother with a discussion of this Court's dispositive authority. Nor is this question *sui generis*. It lurks in every sale and contract of sale. May sellers who collusively refuse to lower the prices reflected in their contracts with buyers claim their buyers have no antitrust claim because they are not "contractually entitled" to a lower price? This could of course be said of any commercial transaction. Until the sale or contract of sale is consummated, neither seller nor buyer has any rights under state law.[5] *General Motors* is the only decision which addresses this question directly, yet *General Motors* is now 20 years old. The present case provides this Court with a rare opportunity to give that critical question of federal-state relations the consideration it needs for the guidance of future antitrust litigants.[6]

IV. The Lower Court's Approval of Respondents' Horizontal Restraints is in Direct Conflict with this Court's Decisions in *Gypsum*, *Perma Life* and *Eichler*

The courts below do not dispute the Water District's substantial evidence of respondents' collusive behavior. Instead they held the Water District was also required to show that respondents' collusion was "*intended* to harm or unreasonably restrain competition" (App. B, p. A-9). They further concluded that it was "the

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[5] In that sense, the Water District is in an even stronger position than a prospective seller or buyer. It has the equitable right to reformation of respondents' inadequate rates which respondents collusively repudiated.

[6] *Indiana Federation of Dentists* does seemingly touch upon the issue. Defendants there claimed their collective actions were reasonable because designed to prevent evaluation of x-rays by unqualified personnel in violation of Indiana law. Rejecting the claim, this Court declared "That a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it." 106 S.Ct. at 2021. The same is true here. Even if respondents could unilaterally refuse equitable reformation of their rates under state contract law, that "is not, in itself, a sufficient justification for collusion among competitors to prevent it."

District's activity which precipitated joint action on the part of defendants and *not* an intent on the part of defendants to harm or unreasonably restrain competition" (App. B, A-9). In support of that conclusion, the District Court declared: "the District arranged numerous joint meetings with and sent countless joint letters to defendants, often with instructions to respond to the District with a mutually acceptable proposal" (App. B, p. A-9).[7] A search of the record below will not yield up a shred of evidence to suggest that respondents' collusive refusal to pay compensatory rates was "precipitated" by the Water District's "joint meetings" with respondents or the Water District's "joint letters" to respondents.

But the Water District does not merely seek this Court's review of the lower court's disregard of the evidence. The Water District seeks review—and correction—of their disregard of this Court's valued precedents. While there was ample proof that respondents intended the harm their collusive action wrought, this Court has declared—plainly and often—that in a civil action under the Sherman Act, liability may be "established by proof of *either* an unlawful purpose *or* an anticompetitive effect." *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n.13 (1978); *see United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969); *United States v. National Ass'n. of Real Estate Boards*, 339 U.S. 485, 489 (1950); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-25 n.59 (1940); *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232, 243 (1980). The Water District informed the courts below of those authorities. They were duty bound to follow them. They did not. They did not even address them.[8] This Court should grant certiorari to correct such

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[7] The court below lifted that assertion (plus others) word for word from the "argument" section of respondents' motion papers (ER 119:25), in disregard of this Court's admonition in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 657 n.4 (1964).

[8] Instead, the District Court simply relied upon *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292 (9th Cir. 1983), one of a growing list of Ninth Circuit decisions which have declared—contrary to *Gypsum*—that plaintiff must prove that *both* the purpose *and* the effect of defendants' collusion was to restrain trade. *O.S.C. Corp. v. Apple*

an inexplicable error concerning such a fundamental matter—the elements of a Sherman Act violation.

But the courts below did not stop with *Gypsum*. They used their disregard of *Gypsum* as a means of compromising this Court's holding in *Perma Life Mufflers, Inc. v. Intern. Parts Corp.*, 392 U.S. 134 (1968) as well. Referring to the Water District's "joint meetings" with respondents and "joint letters" to respondents, the District Court held that "*it was thus the District's activity which precipitated joint action on the part of defendants* and not an intent on the part of defendants to harm or unreasonably restrain competition" (App. B, p. A-9). Included prominently in respondents' motion for summary judgment was the claim that, because of its "joint letters" and "joint meetings," the Water District was guilty of "complete involvement" in the alleged violation (*see Perma Life*, 392 U.S. at 140) and was therefore not entitled to relief. While the District Court said that it "will not address" this "defense," it did much worse. It held that the Water District *was* "completely involved" as a matter of law (i.e., "it was thus the District's activity which precipitated joint action on the part of defendants") and that the Water District's "complete involvement" was irrefutable proof that respondents did not "intend" to harm or restrain competition and therefore could not have violated the Sherman Act (App. B, p. A-9). This is a *pari delicto* holding pure and simple and it was not made any the less so by the District Court's failure to utter the Latin words.

It has been almost two decades since this Court has addressed the *pari delicto* defense in the antitrust context. Is it a defense? The answer is: maybe. The Court was obviously perplexed by the question in *Perma Life*. While all nine members of the Court

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Computer, Inc., 792 F.2d 1464, 1469 (9th Cir. 1986); *Fine v. Barry and Enright Productions*, 731 F.2d 1394, 1399 (9th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 248 (1984); *Los Angeles Memorial Coliseum Commission v. N.F.L.*, 726 F.2d 1381, 1391 (9th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 397 (1984); *Cascade Cabinet Co. v. Western Cabinet & Millwork Inc.*, 710 F.2d 1366, 1373 (9th Cir. 1983); *Ernest W. Hahn, Inc. v. Codding Enterprises*, 615 F.2d 830, 844 (9th Cir. 1980); *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 291 (9th Cir. 1979).

voted to reverse the lower court's entry of summary judgment for defendant in *Perma Life*, the unanimity ended there. *Perma Life* generated five separate opinions and no majority. The plurality declined to address the question of whether "truly complete involvement" in a violation "could ever be a basis, wholly apart from the idea of *in pari delicto*, for barring a plaintiff's cause of action." *Perma Life*, 392 U.S. at 140. The other justices expressed a "variety of views" on the issue (392 U.S. at 153).[9]

During its 1985 Term, this Court granted certiorari in *Eichler v. Berner*, ____ U.S. ____, 105 S.Ct. 2622, 2626 (1985) to determine "the proper scope of the *in pari delicto* defense in securities litigation." It held the answer to the *pari delicto* question should be the same for both antitrust and securities litigation. It then synthesized the several opinions in *Perma Life* into the following test for securities litigation: "Accordingly, a private action for damages in these circumstances may be barred on the grounds of the plaintiff's own culpability only where (1) as a direct result of his own actions, the plaintiff bears at least substantially equal

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[9] Because the Supreme Court rendered a "variety of views" on the issue in *Perma Life*, the circuits have understandably done so also. *See, e.g., Lamp Liquors, Inc. v. Adolph Coors Co.*, 563 F.2d 425, 431 (10th Cir. 1977) (defense rejected); *Greene v. General Foods*, 517 F.2d 635, 646-47 (5th Cir. 1975) (dicta that defense is unavailable), *cert. denied*, 424 U.S. 942 (1976); *Bernstein v. Universal Pictures, Inc.*, 517 F.2d 976, 982 (2d Cir. 1975) (would allow defense if plaintiff's fault equals defendant's fault); *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3, 15-16 (4th Cir. 1971) (would allow defense where plaintiff bears equal responsibility and parties are of equal economic strength); *Premier Electrical Construction Co. v. Miller-Davis Co.*, 422 F.2d 1132, 1138 (7th Cir.) (equal responsibility test), *cert. denied*, 400 U.S. 828 (1970); *Javelin Corp. v. Uniroyal, Inc.*, 546 F.2d 276, 279 (9th Cir. 1976) (would allow defense only when conspiracy would not have been formed "but for" plaintiff's active participation), *cert. denied*, 431 U.S. 938 (1977); *THI-Hawaii, Inc. v. First Commerce Financial Corp.*, 627 F.2d 991, 995 (9th Cir. 1980) ("but for" test); *see also, CVD, Inc. v. Raytheon Co.*, 769 F.2d 842, 856 (1st Cir. 1985), *cert. denied*, ____ U.S. ____, 106 S.Ct. 1198 (1986); *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1254-55 (3d Cir. 1975); *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 715 (11th Cir. 1984).

responsibility for the violations he seeks to redress, and (2) preclusion of suit would not significantly interfere with the effective enforcement of the securities laws and protection of the investing public." *Eichler,* 105 S.Ct. at 2629.

It is reasonable to assume the Supreme Court's decision in *Eichler*, although a securities case, was intended to resolve the *pari delicto* confusion for antitrust litigants as well. If so, that is another good reason for this Court to grant certiorari here. *Eichler* prescribes a new two-pronged test. Yet from *Perma Life* until *Eichler*, no court had ever suggested a second prong (i.e., that "preclusion of suit would not significantly interfere with the effective enforcement of" the antitrust laws). Therefore, in fairness to antitrust litigants confounded by *Perma Life*, certiorari should be granted and the lower court decisions summarily reversed with directions to reconsider the Water District's alleged "complete involvement"—i.e., "the [Water] District's activity which precipitated joint action on the part of defendants"—in light of the new standard enunciated in *Eichler.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 15, 1986

APPENDIX A

United States Court of Appeals
For The Ninth Circuit

Nos. 85-2086 and 85-2220
D.C. No. CV-83-5637-SC

Humboldt Bay Municipal Water District,

Plaintiff-Appellant,

v.

Louisiana-Pacific Corporation, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Honorable Samuel Conti, Judge Presiding

Argued and Submitted March 12, 1986
San Francisco, California

[Filed March 28, 1986]

ORDER

Before: Goodwin, Norris, and Brunetti, Circuit Judges.

For the reasons ably stated by Judge Conti in his judgment granting defendants' motion for summary judgment, we hold that defendants' refusal to renegotiate the price of water established by their forty-year contracts with plaintiff does not give rise to a violation of either section 1 or section 2 of the Sherman Act.

AFFIRMED.

APPENDIX B

United States District Court
Northern District of California

No. C-83-5637 SC

Humboldt Bay Municipal Water District,
Plaintiff,

-vs-

Louisiana-Pacific Corporation, et al.,
Defendants.

[Filed May 10, 1985]

Order Granting Defendants' Motion for Summary Judgment and Dismissing Pendent Claims

Plaintiff Humboldt Bay Municipal Water District ("the District") brings this action against defendant Louisiana-Pacific Corporation ("L-P") and the other defendants, collectively referred to as "Simpson," on two federal and three pendent state claims, alleging, *inter alia*, antitrust violations on the part of L-P and Simpson. The five claims are denominated by plaintiff as follows: 1) "Sherman Act Section 1;" 2) "Sherman Act Section 2;" 3) "Cartwright Act;" 4) "Reformation Due to Economic Impracticability and Frustration of Purpose;" and 5) "Gift of Public Funds." This matter is currently before the court on defendants' motion for summary judgment and plaintiff's motion for partial summary judgment. The court's thorough survey of the voluminous record of evidentiary exhibits reveals the following factual background to this case.

FACTUAL BACKGROUND

The District was formed in 1956 with the purpose of servicing water to one or more potential pulp mills in Humboldt County. The voters authorized the District to issue $12 million in bonds to be secured by ad valorem property taxes. The District put together a plan to build a dam and diversion project capable of supplying Humboldt County with 75 to 125 million gallons of

water a day, the bulk of which would be available for industrial use.

In the spring of 1959, the District began serious negotiations with Georgia-Pacific ("G-P"), the predecessor corporation to L-P, and made a rate proposal for a long-term water supply contract. G-P accepted the rate proposal in writing. Sometime later, Simpson agreed to the same rate proposal that G-P had accepted. Once G-P and Simpson agreed to the rate proposal, the District drafted identical contracts incorporating its proposed rate structure and the 40-year contractual term now complained of by plaintiff, and circulated identical drafts to the negotiators for the mills. G-P and Simpson executed the identical water contracts in September, 1959. Since 1959, the contracts have been identically amended several times.

From the outset, the District insisted that the contracts with each of the mills be identical. It was the District's position that identical contracts and amendments were mandated under California law. The District has continually attempted to have all negotiations concerning the contracts and amendments conducted jointly with all three parties.

As planned, a few months after signing the 1959 contracts, the District issued 40-year municipal bonds secured by its property taxing power. In calculating the rates charged L-P and Simpson, the District hoped to minimize the tax burden on property owners. The identical 1959 contracts, however, imposed no obligation on either side regarding taxes. The District did not impose taxes from 1966, when defendants' pulp mills began operation, until 1976, when the District received an adverse IRS ruling.

The 1959 contracts obligated the District to sell and defendants to purchase a minimum quantity of water, subject to availability, at a price set in the contracts. A sliding scale was set for water sold in excess of the minimum quantities. The prices were subject to adjustment to reflect any differences between estimated and actual costs of construction of the District's facilities and, in fact, the stated prices were increased by 20 percent. In addition, 15 percent of defendants' payments was subject to further annual adjustments based on changes in the index of wholesale prices. By

its terms, the 1959 contracts were to expire on December 31, 1999.

On February 23, 1966, defendants and the District entered into amendments to the contracts for supplemental water volumes. The amendments provided for a sale of additional water, reducible at the District's discretion to supply other customers. The 1966 amended contracts contemplated that the District would construct additional facilities and they related payments for the additional water to be provided to the District's actual or estimated costs for the additional facilities. In order to accomplish this, the amendments established a "Contract Price," to be calculated each year, which was to be the sum of four "Price Factors."

On January 28, 1975, defendants and the District entered into further amendments to the contracts after it became apparent that existing facilities were incapable of providing the amount of water desired. The 1975 amended contracts provided for modifications in the facilities together with an adjustment of prices for water.

For nearly 18 years all the parties operated under and relied on the contracts and their amendments, and nobody challenged their validity in whole or in part. However, on April 14, 1977, the board of directors of the District passed a resolution directing the general manager to prepare an ordinance embodying a new rate schedule applicable to all the District's customers. The resolution was based on the opinion of the board that existing contract provisions that established the price of water to customers consituted an invalid limitation on the power of the board to set rates. On this basis, the board declared that it did not consider itself bound by the rate provisions of any of its industrial or municipal contracts. Pursuant to this resolution, Ordinance No. 10 was passed by the board on July 14, 1977. Ordinance No. 10 established a new rate structure which purported to supercede only those portions of preexisting contracts with the District's industrial and municipal customers which establish rates and charges for water.

Litigation over the validity of Ordinance No. 10 ensued, and on November 2, 1982, the California Court of Appeal rendered a decision which invalidated Ordinance No. 10 and upheld the validity of Simpson's and L-P's contracts with the District. *See Louisiana-Pacific Corp. v. Humboldt Bay Mun. Water Dist.*, 137 Cal.App.3d 152, 162 (1982) (The District entered into the contracts "in order to bind [defendants] to a firm obligation to purchase a specified amount of water and thereby obtained for itself the benefit of a long-term guarantee of patronage. [The] District is bound to the obligation to which it agreed in order to obtain that guarantee.").

In April 1983, on remand to the Superior Court, the District moved to amend its answer and file a cross-complaint to assert for the first time that defendants' conduct regarding the 1959 contracts and the following amendments resulted from a conspiracy to fix prices and restrain trade in violation of California's Cartwright Act. The Superior Court granted the motion but the California Court of Appeal issued a writ of mandate and supporting opinion directing that the amended answer and cross-complaint be stricken.

The District now raises similar antitrust allegations in this federal action under the Sherman Act, 15 U.S.C. § 1 & 2, and the Cartwright Act as raised in the state action solely under the Cartwright Act, along with its pendent state claims.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants' move for summary judgment on various grounds as to the District's federal antitrust claims and pendent state claims. Because defendants' motion for summary judgment is meritorious on the District's federal antitrust claims, as will be discussed immediately below, and because the court will not retain jurisdiction of this case solely on the District's pendent state claims, as will be discussed shortly, the court will only address defendants' motion for summary judgment as to the federal antitrust claims. Defendants first argue that they are entitled to summary judgment because the District cannot establish any of the factual elements necessary to maintain claims for

violations of Sections 1 and 2 of the Sherman Act. Defendants next raise the following four legal defenses which purportedly bar the District's antitrust claims: (a) the District's complete involvement in the activities complained of; (b) the relevant statute of limitations; (c) the *Noerr-Pennington* doctrine; and (d) *res judicata* and collateral estoppel. Because defendants' first argument is accurate that the District cannot establish the factual elements necessary to maintain claims under Sections 1 and 2 of the Sherman Act, as set out immediately below, the court will not address the four defenses raised by defendants.

Generally, summary judgment is appropriate only when the moving party meets its burden of showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *see, Adickes v. Kress & Co.*, 398 U.S. 144, 157 (1970); *Bank of California, N.A. v. Opie*, 663 F.2d 977, 979 (9th Cir. 1981); *State ex rel. Edwards v. Heimann*, 633 F.2d 886, 888 (9th Cir. 1980). Summary judgment is equally available in antitrust cases. *Ralph C. Wilson Indus. v. American Broadcasting*, 598 F.Supp. 694, 699 & n. 5 (N.D. Cal. 1984) and cases and authorities cited therein. In fact, "summary judgment is often particularly appropriate in antitrust cases because of the 'fearful dimensions' of such cases, and the fact that many suits are motivated by 'commercial disappointment' rather than genuine antitrust problems.' *Id.* at 699. (String citations omitted). Furthermore, "[g]iven the enormous expenditure of time and other resources commonly necessary in antitrust cases, the complexity of the issues and the general inexperience of jurors in this area, as well as the need for uniformity and foreseeability in interpretations of the antitrust law, the court should, rather, be particularly alert to granting summary judgment in appropriate cases." *Id.* (String citations omitted).

The posture of this case is appropriate for consideration of summary judgment. The parties have conducted extensive discovery and trial is scheduled a mere few weeks from now. In the context of the fully developed record, "if the court finds that a directed verdict for defendants would be required even if all plaintiff's proffered evidence were admitted at trial, then the court should not be hesitant to grant summary judgment at this stage of

the proceeding. *Id.* at 700; *see also First National Bank v. Cities Service Co.*, 391 U.S. 253, 274-90 (1968) (Held: even though plaintiff's evidence showing conspiracy might present jury question, defendants' evidence to the contrary was so overwhelming that summary judgment was appropriate). Applying the above legal standards to the facts surrounding the District's federal antitrust claims, the court will grant defendants' motion for summary judgment.

First Claim: Sherman Act Section 1

The thrust of the District's first claim, under Section 1 of the Sherman Act, is summarized by the following allegations in the first amended complaint:

> Commencing in approximately 1957 and continuing to the present, defendants have combined and conspired with each other to restrain trade and commerce in the purchase of water in violation of § 1 of the Sherman Act. Pursuant thereto, defendants in September 1959 jointly exacted from the Water District virtually identical exclusive requirements contracts obligating the Water District to supply defendants with the bulk of the Water District's reserves for defendants' use in their pulp mill operations. Both contracts provided for identical prices and both contracts were of identical duration, with an expiration date of December 31, 1999. Said requirements contracts were and are unreasonable restraints of trade. . . .

The District further alleges that, "[a]s a direct result of defendants' violations, the Water District and all taxpayers within its jurisdiction have suffered and will continue to suffer damages in excess of $10 million unless this court intervenes."

In *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1295-96 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 279 (1983), the Ninth Circuit articulated the following standards to be applied when determining alleged violations of Section 1 of the Sherman Act:

> Certain joint conduct by business entities constitutes a *per se* violation of § 1 of the Sherman Act. This category of

conduct includes price-fixing and horizontal territorial division. When this type of behavior is proved, a court is blocked from inquiring into the "reasonableness" of the defendants' actions.

Absent a showing of a *per se* violation, a court must apply a rule of reason analysis. Under this test, the elements of a cause of action for an unreasonable restraint of trade in violation of § 1 of the Sherman Act are:

(1) An agreement among two or more persons or distinct business entities;

(2) which is intended to harm or unreasonably restrain competition; and

(3) which actually causes injury to competition.

(Citations omitted).

Upon a review of the record, as discussed below, the court finds that the District has not established any genuine issues of material fact suggesting that defendants have committed either a *per se* violation of Section 1 of the Sherman Act or rule of reason unreasonable restraint of trade in violation of Section 1.

Alleged Per Se Violation

The first claim of the first amended complaint indirectly alleges that defendants have fixed the price at which they purchase the water from the District by way of their identical long-term contracts, and subsequent contractual amendments, with the District. This allegation fails in light of the earlier summarized evidence which demonstrates that the contractual rate of the water was proposed by the District, and was later accepted by L-P and Simpson separately and independently for inclusion in their separate contracts with the District. Even if defendants negotiated with the District concerning the rates set for the water in the contracts, the law provides that a buyer is not involved in illegal price fixing when it negotiates with a seller to include a price in a commercial contract. *See Sausalito Pharmacy v. Blue Shield of California*, 544 F.Supp. 230, 237 (N.D. Cal. 1981), *cert. denied*, 459 U.S. 1016 (1982).

Rule of Reason Analysis

The District also alleges in the first claim that defendants unreasonably restrained trade in the relevant market for water in Humboldt County. The District alleges that defendants so unreasonably restrained trade by executing identical water contracts at identical rates, taking joint action with respect to proposed terms in later renegotiations of the contracts, initiating litigation in state court over Ordinance No. 10, and by jointly refusing to renegotiate the water contracts subsequent to the litigation over Ordinance No. 10. As set out below, no evidence in the record supports any of the above allegations to the extent that the District can establish a genuine issue of material fact suggesting that L-P and Simpson had an agreement which was intended to harm or unreasonably restrain competition and which actually caused injury to competition.

The evidence instead reveals the following: (1) the District, not defendants, insisted that the water contracts be identical at rates set by the District; (2) the District arranged numerous joint meetings with and sent countless joint letters to defendants, often with instructions to respond to the District with a mutually acceptable proposal, and it was thus the District's activity which precipitated joint action on the part of defendants and not an intent on the part of defendants to harm or unreasonably restrain competition (*cf. Treasure Val. Potato Bar Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 209 (9th Cir. 1974), *cert. denied*, 419 U.S. 999 (1974); (3) the District abrogated the rates set in the water contracts by enacting Ordinance No. 10 and instructed its attorney to file suit in Superior Court to have the ordinance declared valid; consequently, defendants' initiation of litigation was legitimate business behavior to protect the rates under the contracts and was not an unreasonable restraint of trade in light of the fact that the District was proceeding to Superior Court anyway and that defendants ultimately prevailed on the point that Ordinance No. 10 was invalid; and (4) even if defendants had refused to renegotiate the water contracts subsequent to the litigation which resulted in Ordinance No. 10 being held invalid, such refusal would merely obligate the District to abide by the rates set by the contracts; nevertheless, ample evidence demonstrates that Simp-

son, separately and independently from L-P, initiated renegotiation discussions with the District in 1983 which eventually broke off.

Based on the foregoing, the District fails under both *per se* violation standards and rule of reason analysis to provide any factual support for its Sherman Act Section 1 claim, and consequently, defendants' motion for summary judgment must be granted on this claim.

Second Claim: Sherman Act Section 2

The District alleges in its second claim that, "defendants have monopolized and conspired and attempted to monopolize the purchase of water in Humboldt County in violation of § 2 of the Sherman Act (15 U.S.C. § 2)."

Monopolization Cause of Action

To prove monopolization under Section 2 of the Sherman Act, the District must show: (1) the possession of monopoly power in the relevant market; (2) the unlawful acquisition or maintenance of that power; and (3) causal antitrust injury. *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1299 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 279 (1983). Upon a review of the record, there are no genuine issues of material fact to support the District's Section 2 monopolization cause of action. The District fails to establish the first of the above three prongs needed to make out a Section 2 monopolization claim. Monopoly power is the power to control prices or exclude competition, *id.*, and defendants simply have not and do not possess monopoly power over the relevant market of water in Humboldt County. California law grants the District the right to set water rates and to enter into long-term water contracts. Cal. Water Code §§ 71592 and 71616. The totality of the evidence referred to at the outset of this order reveals that it was the District, and not defendants, that calculated and proposed the prices and duration of the 1959 contracts. Furthermore, it was the District that determined those industrial and municipal users to whom it would sell its water and what quantities of water it would sell. Defendants merely have held and currently hold the contractual rights to water granted to them in 1959 and in subsequent amendments to the contracts, and cer-

tainly have not and do not possess monopoly power to control water prices and exclude competition from the water market in Humboldt County.

Attempt to Monopolize Cause of Action

The District's second claim also asserts an attempt to monopolize cause of action. In order to establish a cause of action for attempted monopolization under Section 2, the District must show: (1) a specific intent to control prices or destroy competition in the relevant market; (2) predatory or anticompetitive conduct directed to accomplishing this unlawful purpose; and (3) a dangerous probability of success. *Cascade Cabinent Co. v. Western Cabinent & Millwork*, 710 F.2d 1366, 1373 (9th Cir. 1983). The District puts forth no genuine issues of material fact suggesting that defendants had the specific intent to control prices or competition for the water in Humboldt County, or that defendants engaged in predatory or anticompetitive conduct directed to accomplishing such an unlawful purpose. The District merely asserts that defendants receive 80% of the District's supply of water. However, it was the District, exercising its statutory power to contractually grant that supply of water to defendants, rather than defendants, with alleged intent or conduct to attempt to monopolize the water market, that resulted in defendants' acquisition of their supply of water. Thus, the District's attempt to monopolize cause of action fails.

Conspiracy to Monopolize Cause of Action

The District's second claim also raises a conspiracy to monopolize cause of action. This cause of action, "is similar in its essence to an attempt to monopolize action," as, "[b]oth focus on specific intent to monopolize and anticompetitive acts designed to effect that intent, although in the conspiracy claim the act may be no more than the agreement itself." *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 926 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981). This cause of action fails for the reasons stated above in regard to the District's attempt to monopolize cause of action, and because no evidence has been presented which even circumstantially indicates an agreement existed between defendants to monopolize the relevant water market.

Therefore, based on all of the above, the District has not supported with evidence any of its causes of action under its Sherman Act Section 2 claim, and therefore, defendants' motion for summary judgment must be granted in full on the Section 2 claim.

THE DISTRICT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The District moves for partial summary judgment on its antitrust claims and its pendent reformation claim. Regarding its antitrust claims, the District merely argues that defendant has committed, "a *per se* violation of the antitrust laws." The court has already granted summary judgment in defendants' favor on the District's claims under Sections 1 and 2 of the Sherman Act, and has specifically held that defendants have not committed a *per se* violation under Section 1. Furthermore, as discussed immediately below, the court will not retain jurisdiction of this case based solely on the District's pendent claims, and thus will not consider the District's motion for partial summary judgment on its reformation claim. Therefore, the District's motion for partial summary judgment is denied in full.

THE DISTRICT'S PENDENT CLAIMS

The court concludes that the pendent claims must be dismissed for lack of federal subject matter jurisdiction. Ninth Circuit caselaw provides that, "[t]the doctrine of pendent jurisdiction is one of discretion, not of power, as long as the federal claims are substantial enough to confer subject-matter jurisdiction on the federal court," and the issue of whether pendent jurisdiction is properly assumed is one which remains open throughout the litigation. *Wren v. Sletten Const. Co.*, 654 F.2d 529, 536 (9th Cir. 1981) (per curiam). Furthermore and most importantly, "[w]hen the state issues apparently predominate and all federal claims are dismissed before trial, the proper exercise of discretion requires dismissal of the state claim[s]." *Id.* Having granted summary judgment for defendants on the District's federal antitrust claims, all that remains before the court are the District's

pendent claims which involve state issues. Moreover, the court previously held in its order dated September 21, 1984 that diversity jurisdiction does not lie in this case. Accordingly, the court must properly exercise its discretion by dismissing the District's pendent claims, although at first blush the court finds the District's reformation claim of some merit. The District should bring the pendent claims which are not precluded by previous litigation in state court, if any of these remain viable.

ORDER

In accordance with the foregoing, it is hereby ordered that:

(1) defendant's motion for summary judgment is granted in full on the District's first and second claims under Section 1 and 2 of the Sherman Act;

(2) the District's motion for partial summary judgment is denied in full; and

(3) the District's pendent claims are dismissed for lack of federal subject matter jurisdiction.

Dated: May 10, 1985.

/s/ Samuel Conti
United States District Judge

APPENDIX C

Statutory Provisions Involved

Section 1 of the Sherman Act, 15 U.S.C. § 1, states:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

Section 2 of the Sherman Act, 15 U.S.C. § 2, states:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."